No. 14-232

IN THE
Supreme Court of the United States

WESLEY W. HARRIS, ET AL.,
Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.
Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF OF FORMER OFFICIALS OF THE U.S. DEPARTMENT OF JUSTICE WHO ENFORCED THE VOTING RIGHTS ACT AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are former officials of the United States Department of Justice who had responsibility for enforcing the Voting Rights Act. 52 U.S.C. § 10301 *et seq.* [formerly 42 U.S.C. § 1973 *et seq.*]. Collectively, they served in both Democratic and Republican administrations, and oversaw the preclearance of redistricting plans following the last five Censuses.

Amici have a unique and valuable perspective on the breadth of preclearance requests made prior to this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) and the practical effects should this Court decide that the goal of achieving preclearance prior to *Shelby County* was not a "legitimate" or "rational" interest. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). Each *amici* also has intimate knowledge of the preclearance procedures and protocols for submissions under Section 5 of the Voting Rights Act prior to this Court's decision in *Shelby County*.

Amicus curiae Gilda R. Daniels served in the Civil Rights Division of the Department of Justice from 1995 to 1998 and from 2000 to 2006, including as Deputy Chief of the Voting Section.

Amicus curiae Julie A. Fernandes served in the Department of Justice from 1996 to 2002. There, she litigated cases under section 2 and section 5 of the

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

Voting Rights Act as a trial attorney in the Voting Section of the Civil Rights Division, was Counsel to the Assistant Attorney General for Civil Rights with responsibility for supervision of the work of the Voting Section, and served as an Attorney Advisor at the Office of Legal Counsel. From 2009 to 2011, Ms. Fernandes served as Deputy Assistant Attorney General in the Civil Rights Division, where her responsibilities included direct supervision and oversight of all litigation, legal and policy work of the Voting Section.

Amicus curiae J. Gerald Hebert served in the Department of Justice from 1973 to 1994 and held numerous supervisory positions in the Voting Section of the Civil Rights Division, including Acting Chief, Deputy Chief, and Special Litigation Counsel. Currently, Hebert serves as the Executive Director and Director of Litigation at the Campaign Legal Center, in addition to his private practice specializing in election law and redistricting. He is also an Adjunct Professor of Law at Georgetown University Law Center and at New York Law School, where he teaches courses on voting rights and election law. Hebert has represented numerous jurisdictions in seeking preclearance from the Department of Justice for voting changes.

Amicus curiae Steven J. Mulroy served in the Civil Rights Division of the Department of Justice from 1991 to 2000, and within the Voting Section of the Civil Rights Division from 1991 to 1996. In that time, he worked on numerous Section 5 preclearance submissions and on Section 5 preclearance litigation.

He is currently a Professor of Law and Associate Dean for the Cecil C. Humphreys School of Law at the University of Memphis, where he teaches Voting Rights and Election Law, Federal Discrimination, Constitutional Law, and other courses. He has published scholarly articles on voting rights issues.

Amicus curiae Mark A. Posner served in the Civil Rights Division of the Department of Justice for 23 years, including 15 years in the Division's Voting Section. In the Voting Section, he helped manage the Department's reviews of voting changes submitted for preclearance under Section 5, and served as the Department's Special Section 5 Counsel from 1992 to 1995. He worked on voting rights enforcement for the Lawyers' Committee for Civil Rights Under Law from 2009 to 2015 as a Senior Counsel, and also has published several articles regarding Section 5 enforcement.

Amicus curiae James P. Turner served in the Civil Rights Division of the Department of Justice from 1965 to 1994, working for seven consecutive national administrations of both political parties in enforcing Section 5 of the Voting Rights Act of 1965. As Deputy Assistant Attorney General, he supervised the Division's voting rights enforcement program from 1969 to 1994. He also periodically served as Acting Assistant Attorney General for Civil Rights when that position was vacant, the longest such service was 14 months during 1993 and 1994.

Amicus curiae William R. Yeomans served in the Civil Rights Division of the Department of Justice from 1981 to 2005. From 1996 to 2002, he supervised the work of the Voting Section as Acting Assistant

Attorney General, Chief of Staff and Counselor to the Assistant Attorney General, and Acting Deputy Assistant Attorney General. Prior to that, he litigated appeals involving sections 2 and 5 of the Voting Rights Act as a trial attorney in the Appellate Section. From 2006 to 2009, he served as Chief Counsel for Senator Edward M. Kennedy on the Senate Judiciary Committee where he worked on the 2006 reauthorization of the special provisions of the Voting Rights Act. He currently serves as a Fellow in Law and Government at American University Washington College of Law, where he teaches in the areas of civil rights and legislation.

SUMMARY OF ARGUMENT

Appellants brought this challenge to the 2012 Arizona redistricting plan alleging that the minor population deviations in the plan were motivated by pro-Democratic partisanship. The district court found that they were not. Instead, the district court held that the minor population deviations were motivated by the Commission's goal of achieving Section 5 preclearance on the first attempt. Now, Appellants urge this Court to hold that achieving Section 5 preclearance approval was not a legitimate or rational justification for the minor population deviations. Appellants' arguments are misguided and the repercussions of the holding they request would be significant.

The Commission's goal of complying with Section 5 of the Voting Rights Act's non-retrogression standard and achieving preclearance on the first attempt was a reasonable policy goal with the practical benefits of conserving resources and protecting its sovereign control over the vital function of redistricting. It was both "legitimate" and "rational" and easily justified the minor population deviations in the redistricting plan. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). Indeed, avoiding retrogression, quite apart from preclearance, is a reasonable and legitimate goal.

Nothing in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), a case concerning state sovereignty decided almost a year and a half after the Arizona plan was adopted, suggests otherwise. The relevant inquiry here is whether the Commission acted based on legitimate and rational goals. In the districting context, the Court routinely judges redistricting maps based on the facts

at the time of redistricting. Hindsight logic serves no purpose here. Moreover, *Shelby County* invalidated the Section 4 coverage formula but never suggested that compliance with the Section 5 non-retrogression standard is an unconstitutional goal. And *Shelby County* itself only holds that Section 4 "*can no longer be used* as a basis for subjecting jurisdictions to preclearance." *Id.* at 2631 (emphasis added).

The holding Appellants urge the Court to adopt is incorrect, unnecessary, and would disrupt political stability across the country. At the time of the 2010 redistricting cycle, Section 5 preclearance was mandatory for all or parts of sixteen States (covered States or covered political subdivisions). Preclearance law as it existed at the time of the post-2010 redistricting cycle required covered jurisdictions to take Section 5 compliance and the racial effects of their actions into consideration when designing redistricting maps. The preclearance submission letters of covered jurisdictions demonstrate that States and localities routinely did design their maps in order to comply with Section 5. The preclearance requirements of Section 5 applied to every level of political subunit in those covered jurisdictions. As a result, the number of redistricting plans potentially affected is significant. Between 2010 and 2013, 1,160 redistricting plans were submitted to the Department of Justice for Section 5 preclearance.

Therefore, if this Court were to hold that compliance with Section 5 was not a rational or legitimate consideration, over a thousand redistricting plans would be open to legal challenges, creating

massive instability in the political process in States throughout the nation. Put differently, if *Shelby County* is given the effect that Appellants seek, over a thousand redistricting plans potentially would be open to constitutional equal apportionment challenges (notwithstanding the inclusion of only minor population deviations in the plans). The potential impact of Appellants' suggested rule cannot be understated.

Perhaps acknowledging that their *Shelby County* argument does not hold water, Appellants argue that the Commission's reliance on Section 5 cannot justify the population deviations because the Commission "overshot the mark" by enacting more ability-to-elect districts under the new plan than under the pre-2010 map (a factual proposition unsupported by the decision below) and because Section 5 did not *require* unequal population deviations. Br. of Appellants at 42. These arguments (even if based on a factual predicate, which they are not) misunderstand the Section 5 preclearance procedures and requirements.

First, as the Commission went about its task of drawing a non-retrogressive plan, it did not have before it a simple, clear answer to the critical question of what the precise number of ability-to-elect districts was in the post-2000 plan, as it existed in 2011 (i.e., the non-retrogression benchmark). Accordingly, the Commission had to factor the absence of certainty in this regard into its decision-making. As construed by both the Department of Justice and the District Court for the District of Columbia, the non-retrogression standard did not offer up a simplistic, formulaic answer to the benchmark question. Instead, both the

Department and the District Court laid out a series of analytic factors that each covered jurisdiction should consider (in the first instance), and which the Justice Department and/or the District Court thereafter should consider when preclearance is requested, to identify the number of ability-to-elect districts in the relevant pre-existing plan. Thus, the Commission reasonably relied on the advice of experts and counsel in determining how many ability-to-elect districts existed in the benchmark plan and how many ability-to-elect districts should be drawn in the new plan to obtain preclearance.

Second, Section 5 did not require jurisdictions to violate the one-person, one-vote standard to obtain preclearance. The Section 5 redistricting guidance issued by the Justice Department in 2011 (before the post-2010 redistricting cycle was underway) expressly stated that "[p]reventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7472 (Feb. 9, 2011). Historically, state and local governments have drawn redistricting plans in order to meet the requirements of Section 5 that contained minor population deviations. Plans that include minor population deviations motivated by legitimate goals such as Section 5 compliance are not constitutionally suspect.

The Commission therefore acted reasonably by selecting a map that both satisfied Section 5 and the one-person, one-vote principle under this Court's precedent. The Court should affirm the district court's sound decision.

ARGUMENT

I. If the Court Holds that Achieving Preclearance Under Section 5 of the Voting Rights Act Was Not A Legitimate Or Rational State Interest, It Will Have The Unnecessary and Destabilizing Effect of Subjecting Over a Thousand State and Local Redistricting Plans to *Post-Hoc* Constitutional Challenges.

A. Achieving Preclearance Was a Legitimate and Rational Interest of States Previously Covered by Section 4 of The Voting Rights Act and Nothing in *Shelby County* Counsels a Different Result.

One of the central questions before this Court is whether, assuming any justification of minor population deviations is constitutionally necessary, the Commission's goal of Section 5 preclearance was a "legitimate consideration[] incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579. At the time of the redistricting, Arizona was required to submit any voting change to the Department of Justice or the District Court for the District of Columbia for preclearance and its redistricting plan was not effective as law unless and until it was precleared. 52 U.S.C. §

10304 [formerly 42 U.S.C. § 1973c]; 28 C.F.R. § 51.10. This legal requirement was well-established and upheld by this Court on four occasions. *See Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). The Commission had a compelling reason to comply with a law that had been upheld on four prior occasions. *See League of United Latin American Citizens ("LULAC") v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.); *id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.) (agreeing in separate opinions that Section 5 compliance may serve as a compelling state interest).

Further, the Commission's stated goal was not only a policy goal to comply with applicable federal law, but also a practical goal of obtaining preclearance *on the first try*, J.S. App. at 6a, 23a, 39a, designed to save resources,[2] ensure that the Commission (and not the

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[2] Numerous courts have acknowledged the resource-intensive nature of redistricting. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 750 (1973) (counseling against courts' involvement in the "vast, intractable apportionment slough"); *Bonneville County v. Ysursa*, 129 P.3d 1213, 1221 (Idaho 2005) ("We simply cannot micromanage all the difficult steps the Commission must take in performing the high-wire act that is legislative district drawing."); *Legislature v. Reinecke*, 492 P.2d 385, 389 (Cal. 1972) ("Reapportionment, however, is an extremely complex matter.").

courts) retained control over the redistricting plan,[3] and avoid making Arizona ineligible for bail out for another ten years. J.S. App. at 24a ("The Commission was aware that, among other consequences, failure to preclear would make Arizona ineligible to bail out as a Section 5 jurisdiction for another ten years."); 52 U.S.C. § 10303(a)(1)[formerly 42 U.S.C. § 1973b(a)(1)]. These practical considerations are certainly at least as legitimate and rational as the accepted policies of protecting incumbents or drawing districts based upon political affiliation. *Alabama Legislative Black Caucus v. Alabama ("ALBC")*, 135 S.Ct. 1257, 1270 (2015).[4]

One need only review the district court's opinion in this case to understand the lengthy, complex, and resource-intensive process of redistricting. J.S. App. at 13a-35a (describing the Commission's redistricting process). Failure to achieve preclearance by the Department of Justice would have required the Commission to return to the drawing board, time permitting, and engage in that process all over again, or forfeit the right to draw the State's legislative plan to the courts.

[3] *See, e.g., Navajo Nation v. Ariz. Ind. Redistricting Comm'n*, 230 F. Supp. 2d 998 (D. Ariz. 2002) (court-imposed plan for the Arizona legislature after preclearance was denied).

[4] Appellants' brief suggests that States can never rely on compliance with the Voting Rights Act in order to justify even minor population deviations under 10%, *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (noting that "maximum population deviation[s] [under 10%] fall[] within this category of minor deviations"), because the Voting Rights Act does not *require* districts of unequal population. Br. of Appellants at 41. However, the Court does not demand that States prove that any single factor, such as compactness or incumbency protection, *required* the population deviations in the plan that the State drew. Instead, the Court has

Nothing in *Shelby County* compels, or even counsels, a different result. *Shelby County* did not affect the realities that faced Arizona at the time it drew its plan and submitted its redistricting plan to the Department of Justice. The Commission's decisions must be judged based on the legal and factual landscape facing the Commission at that time. This is especially true here, where the standard only requires that Arizona designed its plan based on a "legitimate consideration," *Reynolds*, 377 U.S. at 579, and the contrary result would undermine both political stability and state sovereignty, *see LULAC*, 548 U.S. at 421 (opinion of Kennedy, J.) (noting that "States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant

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properly allowed States the flexibility to pursue legitimate redistricting objectives so long as they do not lead to significant population deviations, and even then the deviations potentially may be justified. *See Mahan v. Howell*, 410 U.S. 315, 328 (1973) (upholding a plan with a 16% deviation because "the legislature's plan for apportionment . . . *may be reasonably said* to advance the rational state policy of respecting the boundaries of political subdivisions") (emphasis added).

Appellants' argument logically extends to Section 2 of the Voting Rights Act, 52 U.S.C § 10301, as well, suggesting that Section 2 compliance could never be relied upon to justify a population deviation, no matter how small. Such a holding would also wreak havoc on the state redistricting cycle and open the floodgates to litigation wherever the slightest population deviation exists. It would place States in an impossible bind, requiring them to "get things just right," *Bush v. Vera*, 517 U.S. 952, 978 (1996) (plurality opinion), which the Court has declined to do even when applying strict scrutiny analysis.

redistricting, with accompanying costs and instability") and *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.").

To hold otherwise would yield the bizarre result that, in order to comply with the Constitution, Arizona was required to flout then-current U.S. Supreme Court precedent, ignore federal law (Section 5), incur likely significant legal costs for violating federal law, and risk court-imposition of a redistricting plan—all based on a prescient vision of this Court's decision in *Shelby County* over a year later. This hindsight logic cannot prevail. Indeed, this Court has held that States should be given far more leeway even when the standard is not rationality but strict scrutiny. *See Bush v. Vera*, 517 U.S. 952, 978 (1996) (adopting the "strong basis in evidence" standard in order to avoid a "stalemate by requiring the States to get things just right" in recognition of "the importance in our federal system of each State's sovereign interest in implementing its redistricting plan") (internal quotation marks omitted).

Shelby County itself suggests that Arizona's prior reliance on Section 4 coverage is constitutionally acceptable. 133 S.Ct. at 2631 ("[Congress's] failure to act leaves us *today* with no choice but to declare §4(b) unconstitutional. The formula in that section *can no longer be used* as a basis for subjecting jurisdictions to preclearance.") (emphases added). In the post-*Shelby* era, when Arizona decides to redistrict, it may do so without obtaining preclearance approval.

B. Avoiding Retrogression, Apart From Preclearance, Is a Legitimate and Rational Interest Adopted by the Arizona Constitution.

Moreover, while *Shelby County* held that the coverage formula under Section 4 was no longer constitutional, this Court did not address the constitutionality of Section 5 or suggest that the goal of satisfying Section 5 and avoiding retrogression was itself unconstitutional or irrational. 133 S.Ct. at 2631 ("We issue no holding on § 5."). A State has a legitimate concern, even after *Shelby County*, that its voting procedures (including the way it's map is drawn) not have the effect of decreasing the opportunity of minority voters to elect representatives of their choice, especially where the *State* reasonably determines that there has been racially polarized voting and that this pattern of voting has had a racially exclusionary effect. After *Shelby County*, neither the Attorney General nor the D.C. Court may enforce the retrogression standard through the coverage formula of Section 4, but that does not preclude a formerly covered jurisdiction from adopting a plan designed to avoid retrogression, even if such a plan departs from strict population equality. In other words, a State can reasonably prioritize, even after *Shelby County*, ensuring that its redistricting plan does not have the effect of decreasing the opportunity of minority voters to elect representatives of their choice.

Arizona adopted this policy and incorporated it into its own Constitution; certainly that choice is not unconstitutional. Ariz. Const. art. IV, pt. 2, § (14) (A) (designating compliance with the Voting Rights Act as an affirmative goal of the redistricting commission). The Commission merely carried out the goals adopted by the Arizona Constitution. The decision in *Shelby County* cannot alone bear the weight of Appellants' *post-hoc* attempt to invalidate Arizona's considered policy to avoid retrogression during its last redistricting cycle.

C. States and Localities Invariably Did Consider the Goal of Achieving Preclearance in Formulating Their Redistricting Plans and Selecting Other Voting Changes.

Prior to *Shelby County*, every covered jurisdiction was required to seek preclearance, either from the Attorney General or the U.S. District Court for the District of Columbia, of any redistricting plan before the plan could go into effect. 52 U.S.C. § 10304. Under either method, the jurisdiction bore the burden of proof. *Georgia v. Ashcroft*, 539 U.S. 461, 471 (2003) (judicial preclearance); 28 C.F.R. § 51.52(a) (administrative preclearance). Therefore, any covered jurisdiction was required to affirmatively prove, to the Attorney General or the D.C. District Court, that the change had neither the purpose nor effect of "denying or abridging the right to vote on account of race or color [or membership in a language minority group]." 52 U.S.C. § 10304. This meant that the covered jurisdiction was required to prove that its redistricting

plan had neither a discriminatory purpose nor a retrogressive effect. *Beer v. United States*, 425 U.S. 130, 141 (1976).

The preclearance regulations themselves required every preclearance submission by covered jurisdictions to include a statement on the effect of the change on minorities. 28 C.F.R. § 51.27. The regulations also requested the submission of race-based data, such as demographics by race of voters and candidates. 28 C.F.R. § 51.28. Thus, Section 5 required jurisdictions to identify the racial consequences of their redistricting plans and to consider compliance with Section 5 in drawing them. To ignore Section 5 requirements would have invited a Section 5 objection by the Attorney General (or rejection of the plan by the D.C. Court) rendering the plan legally unenforceable. Ultimately, it would have risked the loss of control over the redistricting process. *Connor v. Finch*, 431 U.S. 407, 412 (1977) ("In compliance with [Section] 5 of the Voting Rights Act, Mississippi then submitted the [plan] to the Attorney General of the United States. When he objected to the legislation, the District Court proceeded [to impose another plan].").

Therefore, it is no surprise that States and localities did, in fact, take Section 5 compliance and preclearance into account in its most recent redistricting processes. A few examples, of many, illustrate the point.

In California, which has incorporated compliance with the federal Voting Rights Act into its own Constitution, Cal. Const. art. XXI, § 2(d)(2), the State's independent redistricting commission made it abundantly clear that compliance with Section 5, and

the goal of preclearance, significantly influenced its 2011 redistricting plan:

> In light of Section 5, and plausible interpretations of the 2006 Amendments on the retrogression standard, the Commission drew districts that maintained minority voting strength to the extent possible and did not diminish the ability of any minority group to elect their preferred candidates . . . . The Commission paid close attention to racial and ethnic minority demographics within districts containing all or part of the Covered Counties.[5]

In its preclearance submission to the Department of Justice, California frankly explained: "The [Commission] drew each one of these districts to comply with Section 5 of the Voting Rights Act."[6] Indeed, the Commission specifically identified numerous lines it drew *because of* Section 5:

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[5] California Citizens Redistricting Commission, Final Report on 2011 Redistricting (Aug. 15, 2011), http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf.

[6] Office of Attorney General, California Department of Justice & California Citizens Redistricting Commission, Preclearance Submission of the 2011 Redistricting Plan for the Counties of Kings, Merced, Monterey and Yuba by the State of California Under 42 U.S.C. § 1973c (Nov. 15, 2011), http://wedrawthelines.ca.gov/downloads/meeting_handouts_112011/20111116_crc_gdc_finalpreclearancesubmission.pdf.

- "AD 21 includes . . . part of Modesto to meet the requirements for Merced County under Section 5."[7]
- "The boundaries of AD 21 were drawn partly to avoid retrogression in comparison to the benchmark district containing Merced County."[8]
- "The city of Bakersfield was split to comply with Section 5."[9]
- "Because of the need to comply with the requirements of Section 5 . . . the district was not able to be fully nested."[10]
- "The city of Fresno was split . . . in consideration of Section 5."[11]
- "A small portion of the city of Gilroy was also included to . . . fulfill the requirements of Section 5."[12]

Alaska's 2011 preclearance submission similarly established that the goal of achieving preclearance affected the Alaska Redistricting Board's choices in drawing districts. The primacy of preclearance is evident: "The Board was encouraged to think 'outside-

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[7] California Citizens Redistricting Commission, *supra* note 5, at 31.

[8] *Id.* at 31, note 6.

[9] *Id.* at 33.

[10] *Id.* at 45.

[11] Office of Attorney General, California Department of Justice & California Citizens Redistricting Commission, *supra* note 6, at 19.

[12] *Id.* at 20.

the-box' to ensure it avoided retrogression. . . . As a result, the Board felt compelled to reconfigure the traditional boundaries of Alaska Native rural districts."[13] The Board hired a Voting Rights Act consultant to conduct a racial bloc voting analysis and to assist the Board in its Section 5 retrogression analysis.[14] The submission letter explained at length how the benchmark plan and current plan corresponded with respect to Alaska Natives' ability to elect candidates of their choice and the racial bloc voting analysis the Board undertook to ensure non-retrogression.[15] Ultimately, the Board chose a plan that was approved by its expert consultant.[16]

The Alaska Board noted that it "worked extraordinarily hard to come up with a plan that would meet the federal VRA requirements."[17] In fact, it appears that Alaska did precisely what Arizona did

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[13] Taylor Bickford, Alaska Redistricting Board, & Michael D. White, Patton Boggs LLP, Preclearance Submission of the 2011 Alaska State House and Senate Redistricting Plan by the Alaska Redistricting Board Under Section 5 of the Voting Rights Act at 10 (Aug. 9, 2011), http://www.floridasupremecourt.org/pub_info/redistricting2012/03-02-2012/Filed_03-02-2012_Notice_Supplemental_Authority_Appendix.pdf.

[14] *Id.* at 4.

[15] *Id.* at 7-13.

[16] *Id.* at 11.

[17] *Id.* at 10.

here: drew minority ability-to-elect districts that were slightly under-populated to avoid retrogression.[18]

Louisiana's 2011 preclearance submission also showed that Section 5 compliance motivated its statewide redistricting plans. While the State's preclearance submission is replete with evidence of Louisiana legislators debating what was necessary to achieve preclearance, there was unanimous agreement regarding the importance of preclearance and Section 5 compliance in drawing the plan:

- "Chairman Gallot expressed his opinion that failure to include this additional district would be an impediment to preclearance."[19]
- "It is . . . clear from the testimony in Committee and debate on the floor of the House that Speaker Tucker and Chairman Gallot worked to carefully craft a plan that will have the effect of

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[18] *See* Dr. Lisa Handley, A Voting Rights Analysis of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts at 30-31 (2011), http://www.floridasupremecourt.org/pub_info/redistricting2012/03-02-2012/Filed_03-022012_Notice_Supplemental_ Authority_Appendix.pdf (showing that each ability-to-elect district is slightly under-populated).

[19] Statement of Anticipated Minority Impact at 12, Attachment 6 to Louisiana House of Representatives, Submission Under § 5 of the Voting Rights Act: Act 1 of the First Extraordinary Session, 2011 Redistricting the Louisiana House of Representatives (April 21, 2011), ftp://legisftp.legis.state.la.us/06%20Statement%20of%20Minority%20Impact/Minority%20Impact.pdf.

increasing the number of districts across the state that demonstrate an ability to elect a minority candidate of choice."[20]

- "With respect to the remainder of the demographic changes, Speaker Tucker and Chairman Gallot both indicated that where an effective majority minority district could reasonably b[e] drawn it was included in the plan."[21]

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[20] *Id.* at 20.

[21] *Id.* at 25; *see also* Glenn F. McConnell, President *Pro Tempore* of the South Carolina Senate, Submission Under Section 5 of the Voting Rights Act: Request for Preclearance, South Carolina Senate Districts, S. 815, Act 71 of 2011 (July 27, 2011), http://redistricting.scsenate.gov/Cover%20Letter/SC%20Senate%20-%20Preclearance%20Cover%20 Letter.pdf ("Dr. Richard Engstrom conducted a thorough analysis of the changes embodied in Act 71 and concluded that *'the state did an impressive job of avoiding retrogressive results.'*") (emphasis added); Florida Legislature, Submission Under Section 5 of the Voting Rights Act: Request for Preclearance of Florida House Districts in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties (Mar. 12, 2012), http://www.flsenate.gov/UserContent/Session/Redistricting/20120312Preclearance/Request%20for%20Preclearance/Submission%20Memorandum%20-%20House.pdf (noting the preservation of all minority ability-to-elect districts in the redistricting plan); Florida Legislature, Submission Under Section 5 of the Voting Rights Act: Request for Preclearance of Florida Congressional Districts in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties (Mar. 12, 2012), http://www.flsenate.gov/UserContent/Session/Redistricting/20120312Preclearance/Request%20for%20Preclearance/Submission%20Memorandum%20-%20Congress.pdf (same); *id.* at 11 (noting the Florida

Local governments also focused on preclearance and Section 5 compliance when designing local redistricting plans. In Dallas County, the Commissioners Court's 2011 preclearance submission demonstrates close attention to the Section 5 retrogression standard. The Dallas County Commissioner Precinct Redistricting Criteria specifically requires that redistricting plans "meet all requirements of Section 5 of the Voting Rights Act prohibiting retrogression of racial and language minorities."[22] In its submission letter and accompanying statement of change, Dallas County carefully analyzed the racial composition of its newly-drawn districts and discussed how its plan considered and impacted the County's minority population.[23]

Similarly, the New York City Districting Commission's 2013 preclearance submission outlined the Commission's close adherence to Section 5's preclearance requirements in drawing the plan. The Commission was clear that its plan "retain[ed] nineteen

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Constitution's incorporation of the Section 5 standard, "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice," Fla. Const. art. III, § 20(a)).

[22] Dallas County Commissioner Precinct Redistricting Criteria, *in* Dallas County Clerk, April 26, 2011 Court Orders at 137, https://www.dallascounty.org/department/countyclerk/courtorders/2011Apr26c.pdf.

[23] Statement of Change, Ex. C to J. Gerald Hebert (on behalf of Dallas County Commissioners Court), Submission Under Section 5 of the Voting Rights Act Decennial Redistricting Measures that Change District Boundaries (July 15, 2011) (included in Appendix).

'ability-to-elect' districts as required by Section 5 of the Voting Rights Act."[24] The Commission's submission carefully illustrated the redistricting plan's maintenance of benchmark districts as well as its creation of an "additional 'opportunity-to-elect' district."[25] The Commission retained a voting rights expert to assist it in drawing a plan that met the requirements of Section 5.[26] It further explained that it made changes to one district in particular, District 8, to ensure that the district was maintained as an "ability-to-elect" district in compliance with Section 5: "[T]his change also addressed a challenge the Commission confronted with respect to District 8's status as an 'ability to elect' district by increasing the share of the Hispanic population within the district's boundaries."[27] Therefore, New York City is yet another example of a covered jurisdiction that carefully calibrated its plan to comply with Section 5's preclearance requirements.[28]

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[24] City of New York 2012-2013 Districting Commission, Submission for Preclearance of the Final Districting Plan for the Council of the City of New York (Mar. 22, 2013), http://www.nyc.gov/html/dc/html/ submission.html; *see also* N.Y.C. Charter § 52 (2009) ("Such districting plan shall be established in a manner that ensures the fair and effective representation of the racial and language minority groups in New York city which are protected by the United States voting rights act.").

[25] City of New York 2012-2013 Districting Commission, *supra* note 24, at 17-36.

[26] *Id.* at 20.

[27] *Id.* at 16.

[28] Legislators, unsurprisingly, focused on achieving preclearance when crafting other voting changes as well. For example, the

D. Invalidating Achieving Preclearance As a Legitimate Goal Would Threaten the Validity of Over a Thousand State and Local Redistricting Plans.

If this Court reverses the district court and holds that Section 5 was not a legitimate redistricting objective prior to *Shelby County*, the foregoing jurisdictions' redistricting plans will all be thrown into question and subject to equal apportionment challenges (even if their total population deviation is below 10%). However, these exemplary jurisdictions are only the tip of the iceberg.

At the time of the most recent redistricting cycle, following the 2010 Census, nine States were covered entirely by Section 5: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. 28 C.F.R. Pt. 51, App. Another seven States were partially covered: California (4 counties), Florida (5 counties), Michigan (2 townships), New Hampshire (10 towns and townships), New York (3 counties), North Carolina (40 counties), and South

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district court trial regarding the South Carolina voter identification bill is replete with evidence that the bill was crafted with section 5 preclearance in mind. *South Carolina v. United States*, 898 F. Supp. 2d. 30, 54 (D.D.C. 2012) (Bates, J. concurring) (quoting Senator Glenn F. McConnell explaining his efforts to pass a bill that "had a better chance of getting preclearance" and noting that "[t]here was a discussion about" how "to craft a bill that would comply with the voting rights amendment"); *see also id.* (noting that the Speaker of the House Robert Harrell "ask[ed] the staff who drafted the bill for me to please make sure that we are passing a bill that will withstand constitutional muster and get through DOJ or through [the district] court").

Dakota (2 counties). *Id.* For each of the partially-covered States, statewide redistricting plans that affected the covered jurisdictions had to be precleared. *Monterey Cnty.*, 525 U.S. at 278. During the 2010 Census redistricting cycle, the Department of Justice alone made a preclearance determination of 37 statewide redistricting plans in 11 States.[29] This does not include the statewide redistricting plans of those jurisdictions that chose to seek preclearance in the U.S. District Court for the District of Columbia, but nonetheless developed their plans to comply with Section 5.

The preclearance requirement's reach was both broad and deep. In addition to state legislative and congressional plans, it required preclearance of redistricting plans (and other voting changes) in every political subunit within a covered jurisdiction, including school districts, cities and towns, and counties. 28 C.F.R. § 51.6. It covered "any change" in redistricting even if the change "appear[ed] to be minor or indirect, return[ed] to a prior practice or procedure, seemingly expand[ed] voting rights, or [was] designed to remove the elements that caused the Attorney General to object to a prior submitted change." 28 C.F.R. § 51.12. The result is a far larger number of affected local redistricting plans. From 2010 to 2013, 1,160 redistricting plans were submitted to the Department

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[29] United States Department of Justice, Civil Rights Division, Status of Statewide Redistricting Plans, http://www.justice.gov/crt/status-statewide-redistricting-plans (last visited Oct. 29, 2015).

of Justice for Section 5 preclearance.[30] Therefore, statewide redistricting plans are only a fraction of the plans at risk if this Court holds that achieving preclearance under Section 5 was not a valid state interest for purposes of achieving equal apportionment in plans enacted after the 2010 Census and before *Shelby County* was decided.[31]

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[30] United States Department of Justice, Civil Rights Division, Section 5 Changes By Type And Year, http://www.justice.gov/crt/section-5-changes-type-and-year-2 (last visited on Oct. 29, 2015).

[31] In addition, such a holding, which is inconsistent with the Court's prior conclusion that Section 5 compliance is a compelling state interest, *see supra* at 8, could lead to a raft of new claims that redistricting plans (and other voting changes) that were designed to achieve Section 5 compliance were unconstitutional racial gerrymanders (or other unconstitutional legislation). *See Shaw v. Reno*, 509 U.S. 630, 649 (1993) (recognizing racially gerrymandering as a cognizable claim under the Fourteenth Amendment); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (In order to trigger strict scrutiny in a case alleging a racial gerrymander, "[t]he plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's [redistricting] decision . . . ."). Indeed, these redistricting plans and voting changes might be particularly susceptible to attack because the evidence of racial consideration is clearly laid out in the jurisdictions' preclearance submissions. *See supra* Section I.c.; *see also* 28 C.F.R. § 51.27 (requiring a statement of the effect on racial minority groups); 28 C.F.R. § 51.28 (requested detailed racial demographics with submissions). This would create further political instability not only involving the post-2010 redistricting plans now being enforced, but possibly opening the door to challenges to other voting changes covered by the preclearance requirement that remain in force today. *See, e.g.*, 28 C.F.R. § 51.13 (listing covered voting changes included polling places, voter

The dissenting judge below suggested that post-2010 redistricting maps will not be invalidated because "[h]opefully few or no other jurisdictions conscripted Section 5 preclearance to work statewide partisan malapportionment." J.S. App. at 128a. However, that argument is circular and fails to recognize the sweeping implications of a holding that rejects achieving preclearance as a legitimate policy goal. First, the argument is circular because it concludes that the Commission's plan improperly furthered partisan goals by dismissing the Commission's Section 5 preclearance goals as invalid after *Shelby County*. Therefore, the conclusion that Section 5 preclearance was "conscripted" to hide partisan motives is logically unsound. Moreover, while Appellants in this case assert partisan motives, the holding Appellants seek would affect the validity of any plan with any population variance that was drawn to comply with Section 5, regardless of any secret partisan motives.[22]

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qualifications, methods of election, forms of government, candidate qualifications, etc.).

[22] Some of these jurisdictions may be able to rely on compliance with Section 2 as an additional factor motivating their decisions. *Bush v. Vera*, 517 U.S. 952, 978 (1996). However, the Section 2 and Section 5 tests are distinct. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 486-87 (1997). This Court has made clear that, in order to achieve preclearance, a covered jurisdiction need not prove that it complied with Section 2. *Id.*; *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 341 (2000).

Anyone skeptical of the likely litigious fallout resulting from such a holding need look no further than this case, where the Appellants are challenging a redistricting plan with minor population deviations below 10% that actually performs better for Republicans, the party allegedly harmed by this plan according to Appellants, than their proportional share of the State's voter registration numbers. J.S. App. at 98a. The rule that Appellants advocate would twist *Shelby County* to invalidate over a thousand state and local legislative plans across the country. Such a result is neither necessary under this Court's precedent nor desirable.

II. Appellants' Arguments Fundamentally Misunderstand the Preclearance Procedures Under Section 5 of the Voting Rights Act.

The district court found that the "primary factor driving the population deviation was the Commission's good-faith effort to comply with the Voting Rights Act and, in particular, to obtain preclearance from the Department of Justice on the first try." J.S. App. at 6a. For the foregoing reasons and the reasons stated in the district court's opinion, this goal was reasonable, legitimate, and rational and therefore uncontroversial under this Court's precedent. *See supra* Sections I.a and I.b.

Nonetheless, Appellants argue that the minor population deviations cannot be justified by this goal because the Commission "overshot the mark" in attempting to comply with Section 5 and the Voting Rights Act does not "require or authorize population inequality." Br. of Appellants at 42-43; *see also* Br. of

Appellee Secretary of State at 39-43. These arguments not only distort the appropriate standard, *see supra* note 4, but also misunderstand the Department of Justice preclearance procedures and guidelines.

First, the district court specifically declined to determine the precise number of ability-to-elect districts that were required to satisfy Section 5 and held that Appellants failed to meet their burden to prove their allegation that only eight ability-to-elect districts were required. J.S. App. at 74a. Therefore, Appellants argument is unsupported by the record below. The district court properly focused on whether the Commission's acted legitimately in furtherance of its goal of Section 5 preclearance. *Id.* An understanding of the preclearance procedure demonstrates that it did.

As the Commission went about its task of drawing a non-retrogressive plan, it did not have before it a simple, clear answer to the critical question of what the precise number of ability-to-elect districts was in the post-2000 plan, as it existed in 2011 (i.e., the non-retrogression benchmark). In other words, there was no clear "mark" to over- or undershoot.[33] While the

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[33] Appellants' argument that the Commission "overshot the mark" slyly suggests improper race-conscious redistricting. However, this issue is not presented because Appellants chose not to challenge the plan as a racial gerrymander and acknowledge that this is not a racial gerrymandering case. J.S. App. 64a ("[T]his is not a racial gerrymandering case."). Appellants are attempting to smuggle race-conscious districting concerns into their equal apportionment claim because they cannot meet the appropriate standard for racial gerrymanders. The Court should not accept the Appellants' invitation to address this false and unsubstantiated

covered jurisdiction knew that the standard was retrogression, *see Beer*, 425 U.S. at 141, and that the proposed plan would be compared to the benchmark plan, 28 C.F.R. § 51.54 (c), the Attorney General never instructed the covered jurisdiction precisely how many ability-to-elect districts existed in the benchmark plan or that needed to be preserved in a proposed plan. J.S. App. at 23a. Accordingly, the Commission had to factor into its decision-making the absence of certainty in this regard.

As construed by both the Department of Justice and the District Court for the District of Columbia, the non-retrogression standard did not offer up a simplistic, formulaic answer to the benchmark question, and instead both the Department and the District Court laid out a series of analytic factors that each covered jurisdiction should consider (in the first instance) and then the Justice Department and/or the District Court thereafter should consider in identifying the number of existing ability-to-elect districts in each submitting jurisdiction. *See, e.g.*, *Texas v. Holder*, 831 F.Supp.2d 244, 260, 262-265 (2011) (noting that "assessing retrogression is a multifaceted, fact-specific inquiry" and "determining where and how the ability to elect is present is a careful inquiry" and listing various factors to consider). The Commission properly engaged in precisely the type of functional analysis the non-retrogression standard demanded.

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concern as to the manner in which the Commission designed the 2012 plan.

The Department of Justice issued detailed guidance in 2011 to assist covered jurisdictions in complying with the Section 5 non-retrogression standard. Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470 (Feb. 9, 2011). That guidance observed that "[t]he Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment [of ability-to-elect districts in the benchmark plan]." *Id.* at 7471. The Department acknowledged that "[c]ircumstances, such as differing rates of electoral participation within discrete portions of a population may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change." *Id.* Therefore, the Section 5 ability-to-elect analysis considered not only census data but also data on election history, voting patterns, voter registration, and voter turnout. *Id.* As this case demonstrates, determining the number of ability-to-elect districts in a benchmark or proposed plan "require[d] a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.*

This functional approach was neither new nor novel. *Texas*, 831 F. Supp. at 265 (noting that the District Court's analysis "share[d] many factors" with the DOJ guidance, which was "consistent with the guidance DOJ ha[d] been issuing to assess retrogressive effect for the past two decades"). It allowed covered jurisdictions ample space to design redistricting plans that applied their own redistricting criteria while also ensuring compliance with Section 5's non-retrogression principle.

In keeping with this approach, the Commission conducted a functional analysis, which showed that it was possible to draw between 7 and 10 ability-to-elect districts. J.S. App. at 27a. Thus, as applied to this redistricting, the multi-factored analysis did not necessarily yield a precise "mark" for the Arizona to meet.

"The preclearance process is by design a stringent one." *McCain v. Lybrand*, 564 U.S. 236, 257 (1984). At trial, Bruce Cain, a Voting Rights Act expert, testified that covered jurisdictions often considered it prudent "to be cautious and to take extra steps" to ensure compliance. J.S. App. at 22a (internal quotation marks omitted). The Commission received advice from both its counsel and its Voting Rights Act expert that, in order to ensure preclearance, the Commission would need to present ten ability-to-elect districts to the Department of Justice. *Id.* at 30a. This advice was based on the type of functional analysis that the Department of Justice Guidelines employed. *Id.* at 27a ("Counsel advised that there were some districts without a majority-minority population that had a history of electing minority candidates" and thus, there were "two to three other districts where minorities did not make up the majority [but] nonetheless might be viewed as having the ability to elect."). Appellants would have had the Commission eschew this advice and embark on a path that might have drawn a Section 5 objection by creating fewer ability-to-elect districts. The Commission can hardly be faulted for seeking to avoid a violation of federal law that was applicable to it at that time.

Further, on advice of counsel, the Commission designed a plan that included ten ability- or opportunity-to-elect districts and a total population deviation under 9%. J.S. App. at 12a, 35a. Given that the Commission valued preclearance on the first attempt for legitimate practical and policy reasons, *supra* at 8-13, the Commission's redistricting plan did not overshoot any mark. Instead, it represented a reasonable, good faith effort to construct a map that would both pass constitutional muster and be effective as law after a seamless preclearance process.

Both the Secretary and Appellants make much ado about nothing by arguing that Section 5 does not *require* unequal populations and cannot constitutionally *require* unequal populations in violation of the one-person, one-vote principle. Br. of Appellants at 43; Br. of Appellee Secretary of State at 39-43. While that is true, it misses the point entirely by ignoring this Court's precedents. The Court has repeatedly said that exact population equality in state legislative redistricting is *not* a constitutional requirement. *See, e.g.*, *Reynolds*, 377 U.S. at 578-80; *Brown*, 462 U.S. at 842-43. Minor population deviations, even above 10%, are constitutionally inoffensive when incident to implementing legitimate and rational state districting policies. *Mahan*, 410 U.S. at 328-330; *see also Brown*, 462 U.S. at 842 (upholding a legislative redistricting plan with an average deviation of 16% and a total deviation of 89%).

Therefore, this case is not one where Section 5 of the Voting Rights Act required the Commission to create a plan with unconstitutional population inequality. If a State attempted to justify extreme deviations by relying on the Voting Rights Act, the Appellants' argument might hold some water. But this is not that case. Therefore, while Appellants' argument that "[a] statute cannot command a constitutional violation," Br. of Appellants at 44, is technically correct, it proves nothing where Appellants have failed, as an initial matter, to establish any constitutional violation.

Meanwhile, Appellants are of course correct that nothing in the Voting Rights Act *requires* under- or over- population of districts. The Attorney General's redistricting guidance makes clear that Section 5 did not require jurisdictions to violate the one-person, one vote standard to obtain preclearance. The DOJ guidance expressly stated that "[p]reventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." 76 Fed. Reg. at 7472. However, even when a redistricting plan is submitted for preclearance and the submitted plan violates the one-person, one-vote requirements, "[t]he Attorney General may not interpose an objection" based on that violation. The reason for this is that the Department of Justice's statutory mandate under Section 5 was to ensure that no voting change had the purpose or the effect of diminishing the ability of minorities to elect their candidates of choice. 52 U.S.C. § 10304. For all the reasons discussed above, compliance with Section 5 was precisely the type of rational policy that would justify

minor population deviations under this Court's precedent.

In its 2011 redistricting guidelines, the Department of Justice explained that when considering the availability of less-retrogressive alternative plans for congressional redistricting, a plan "that would require a greater overall population deviation . . . is not considered a reasonable alternative." 76 Fed. Reg. at 7472 (mirroring the strict equal population standard for Congressional districts, *see, e.g.*, *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) ("[T]he command of Art. I § 2 . . . permits only the limited population variances which are unavoidable.")). But for state legislative and local redistricting, where the constitutional demand for equal population is less stringent, "a plan that would require *significantly greater* overall population deviations is not considered a reasonable alternative." 76 Fed. Reg. at 7472.

Therefore, the Department of Justice would have precleared a plan whether the proposed plan contained a one-person, one-vote violation or, like the plan at issue here, contained only minor population deviations. However, if Arizona's submitted plan was retrogressive, the DOJ may have considered a plan with minor constitutionally-sound population deviations to be a valid alternative plan. Based on the Department of Justice 2011 Guidance and the constitutional principles at play, the Commission properly accepted the advice of counsel that minor population deviations were entirely acceptable in a plan designed to avoid retrogression and ensure Section 5 compliance and preclearance.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court.

November 2, 2015 Respectfully submitted,

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APPENDIX

Appendix

Dallas County, Texas

2011 Decennial Redistricting Preclearance Submission, Exhibit C

STATEMENT OF CHANGE

Dallas County, Texas is divided into four (4) election precincts for the purposes of electing the four members of the Dallas County Commissioners Court. (The County Judge is elected countywide and is the fifth member of the Court.) The 2011 redistricting in Dallas County was driven by the imbalance in population amongst the four precincts. Precinct 1 was under populated by 68,500 persons for a deviation of -11.6% from the ideal. Precinct 4 was overpopulated by 57,880 persons from the ideal for a deviation of +9.8% from the ideal.

Dallas County has had a dramatic demographic shift over the last ten years. Dallas has gained 149,240 persons between 2000 and 2010. However, the Anglo population has decreased by 198,624 persons between 2000 and 2010. The Hispanic population grew by 243,211 persons and the African American population has grown by 73,016 persons. In the approved redistricting criteria, the Commissioners Court decided, "Districts should respect population increases and take into account population decreases in Dallas County." (see **Exhibit D**)

Current or Benchmark Map

Precinct 1 is currently dominated by Anglos and has consistently voted for Republican candidates throughout the last decade. Precinct 2 under the benchmark map was also drawn as an Anglo dominated Precinct configured to elect a Republican candidate. Precinct 2 saw significant demographic change from 2001 to 2010 and is now a majority minority Precinct. Precinct 2 is currently represented by Commissioner Mike Cantrell, an Anglo Republican. Precinct 3 is 45.6% African American and was configured in 2001 to elect the candidate of choice of African American voters (Commissioner John Wiley Price) and has done so throughout the last decade. Precinct 4 was originally configured in 2001 to elect an Anglo Republican. However population growth through the decade has made the Precinct 49.3% Hispanic and 16.9% African American. In 2010, voters in Precinct 4 elected a Hispanic Democrat (Commissioner Dr. Elba Garcia).

Substantial Equality in Population:

As prescribed by law, decennial redistricting must strive to achieve equality of representation as a goal, *i.e.* each electoral district within a county should contain approximately the same number of people to comply with the "one person, one vote" requirement of the Federal Constitution.

The chart entitled "2001 Dallas County Commissioners Precincts – Total Population by Race" **(Exhibit L)** provides population data (based upon 2010 U.S. Census figures) for each of the current four precincts. **Exhibit** L also shows the deviation from the ideal population in

the benchmark (current) plan. After adoption of the redistricting Court Order, the four precincts will have substantial equality in population distribution, and therefore will have "equal representation." Specifically, the deviation for the four election precincts is as follows: Precinct 1 is +1.7%, Precinct 2 is -2.3%, Precinct 3 is -3.2% and Precinct 4 is +3.7% all as shown on a chart entitled "2011 Dallas County Commissioner Precincts – Proposed Map – Deviation" attached hereto as **Exhibit M.**

Consideration of a New Majority Hispanic Precinct:

Given the explosive growth in the Hispanic Population from 2000 to 2010, members of the Commissioners Court considered the creation of a second Hispanic opportunity precinct. In attempting to draw a second Hispanic precinct, it was discovered that too much Hispanic population had to be taken from Precinct 4 (Currently represent by an Hispanic (Dr. Elba Garcia)). Taking Hispanic population out of Precinct 4 would have put Hispanics in Precinct 4 at risk of losing the ability to elect the candidate of their choice and so no such maps were produced by the Commissioners Court.

A New Minority Opportunity Precinct

The Court decided that a new district could be configured that would take account for both the dramatic population growth and population loss that occurred in the last decade. The precinct, new Precinct 1, was drawn with population from three of the four "old" or benchmark precincts. The new precinct is 48.0% Hispanic and 21.2% Black. Minority voters will have the opportunity to elect their candidate of choice in the

Democratic primary and in the general election. While population data by race and ethnicity was considered by the Commissioners Court, racial considerations were never the soul or predomination consideration. Instead, the Commissioners Court drew Precincts to adhere to the traditional redistricting criteria they adopted (which included compliance with federal law, including the **Voting Rights Act**).

Number Change

The Dallas Commissioners Court voted (3 to 1) to switch the numbers on what were Precinct 1 and Precinct 2 in the current map. The old Precinct 2 was renumbered as District 1 and an election will be held in this district in 2012. Precinct 1 in the current map was given the number 2 and its voters will elect a commissioner in the 2014 elections.

During the onset of the redistricting process, the Commissioner who currently represents Precinct 1 (in the old map) announced she would not run for reelection. This arrangement meant that the newly drawn Precinct would be represented by an Anglo Republican living outside the Precinct until an election was held in 2014. Under the new configuration, the new Precinct will have an election in 2012 to elect a new commissioner while the old Precinct 1 (now Precinct 2 in the northern part of Dallas County) will be represented by the non-retiring Anglo Republican who lives in the Precinct until 2014.